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IN THE

Supreme Court of the United States

October Term, 1964

No. 162

JERROLD ELECTRONICS CORPORATION
and JERROLD-NORTHWEST, INC.,
Petitioners,

v.

WESCOAST BROADCASTING COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
1. The Court of Appeals Has Sanctioned Such a Departure From Procedural Rules and Usual Course of Trial by Jury as to Call for the Exercise of This Court's Power of Supervision	7
2. The Court of Appeals Decided Two Questions of Federal Law Contrary to Applicable Decisions of This Court	11
A. The Improper Charge of Monopoly	11
B. The Necessity for a Significant Relation Between the Alleged Violation and Interstate Commerce	12
3. The Important Question of Federal Law as to the Binding Effect Upon a Party of Evidence Offered by It Should Be Settled by This Court	14
Conclusion	19
Appendix A—Opinion of United States Court of Appeals for the Ninth Circuit	1a
Appendix B:	
Amendment VII of the Constitution of the United States	23a
Sections 1 and 2 of the Sherman Act, 15 U. S. C., §§ 1, 2	23a

TABLE OF CASES CITED.

	Page
Barnett v. Terminal Railroad Ass'n., 228 F. 2d 756 (8th Cir. 1956), cert. den. 351 U. S. 953 (1956)	15
Bolam v. Louisville and Nashville Railroad Company, 295 F. 2d 809 (6th Cir. 1961)	15
Brady v. Southern R. Co., 320 U. S. 475 (1943)	18
Clark Marine Corporation v. Cargill, Inc., 226 F. Supp. 103 (D. La. 1964)	18
Downie v. Powers, 193 F. 2d 760 (10th Cir. 1951)	10
Evanston Cab Co. v. City of Chicago, 325 F. 2d 907 (7th Cir. 1963), cert. den. 377 U. S. 943 (1964)	13
H. E. Fletcher v. Rock of Ages Corp., 326 F. 2d 13 (2d Cir. 1963)	13
Galloway v. United States, 319 U. S. 372 (1942)	1
Gordon v. Illinois Bell Telephone Company, 330 F. 2d 103 (7th Cir. 1964)	13
Hanna v. Plumer, U. S. Sup. Ct. (April 26, 1965)	8
Howard v. Swagart, 161 F. 2d 651 (D. C. 1947)	15
Hotel Phillips, Inc. v. Journeymen Barbers, etc., 301 F. 2d 443 (8th Cir. 1962)	13
Hunt v. Crumboch, 325 U. S. 821 (1945)	14
Kansas Transport Co. v. Browning, 219 F. 2d 890 (10th Cir. 1955)	15
Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U. S. 207 (1959)	13
Kotteakos v. United States, 328 U. S. 750 (1946)	10
L. P. Larson, Jr. Co. v. Wm. Wrigley, Jr. Co., 253 Fed. 914 (7th Cir. 1918)	15
Lieberthal v. North County Lanes, Inc., 332 F. 2d 269 (2d Cir. 1964)	13
Lowy v. C. I. R., 288 F. 2d 517 (2d Cir. 1961)	15

TABLE OF CASES CITED (Continued)

	Page
Markley v. Baldwin, 112 U. S. 490 (1884)	12
Martin v. E. I. duPont De Nemours & Co., Inc., 281 F. 2d 801 (3d Cir. 1960)	15
National Wrestling Alliance v. Myers, 325 F. 2d 768 (8th Cir. 1963)	11, 12
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333 (1933)	17
Sunkist Growers v. Winckler and Smith Co., 370 U. S. 19 (1962)	12
Swain v. Boeing Airplane Company, 337 F. 2d 940 (2d Cir. 1964), cert. den. — U. S. — (1965)	9
United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945)	18
United States v. Consolidated Laundries Corp., 291 F. 2d 563 (2d Cir. 1961)	11
United States v. E. I. DuPont De Nemours & Co., 351 U. S. 377 (1956)	11
United States v. Sobell, 314 F. 2d 314 (2d Cir. 1963)	8
Volasco Products Company v. Lloyd A. Fry Roofing Co., 308 F. 2d 383 (6th Cir. 1962)	12
United States v. Yellow Cab Co., 332 U. S. 218 (1947)	13

STATUTES AND AUTHORITIES CITED.

	Page
Act of May 24, 1949, C. 139 § 110, 63 Stat. 105, 28 U. S. C. § 2111	9
Clayton Act:	
Section 3, 15 U. S. C. § 14	3
Section 7, 15 U. S. C. § 18	3
Constitution of the United States, Seventh Amendment	7
Federal Rules of Civil Procedure:	
Rule 51	8
Rule 61	9
The Jury System in the Federal Courts, Handbook for Jurors, 26 F. R. D. 409, 460 (1960)	9
Note, Binding effect of party's own unfavorable testimony (1947), 169 A. L. R. 798	15
Note, Indoctrination by court of persons summoned for jury service (1963), 89 A. L. R. 2d 197	9
Prettyman, Jury Instructions—First or Last? (1960), 46 Am. Bar. Ass. J. 1066	9
Report of the Attorney-General's National Committee to Study the Antitrust Laws (1955), p. 1	18
Restatement of the Law of Torts (1938), Illustration 4, section 709, p. 527	18
Sherman Act, 26 Stat. 209:	
Section 1, 15 U. S. C. § 1	3
Section 2, 15 U. S. C. § 2	3

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No.

JERROLD ELECTRONICS CORPORATION AND JERROLD-NORTHWEST, INC.,
Petitioners

v.

WESCOAST BROADCASTING COMPANY, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 22, 1965.

OPINIONS BELOW.

The District Court for the Western District of Washington, Northern Division, rendered no opinion. The opinion of the Court of Appeals for the Ninth Circuit is reported at 341 F. 2d 653. A copy of the opinion appears in Appendix A.

JURISDICTION.

The judgment of the Court of Appeals was made and entered on January 22, 1965. A Petition for Rehearing was filed on February 16, 1965, and was denied on March 1, 1965.

QUESTIONS PRESENTED.

1. Is a judge's statement about the case to the jury at the opening of a trial such a departure from the accepted and usual course of trial by jury as to constitute a substantial violation of the rights of a party, particularly when points of law in the judge's statement are erroneous and inapplicable?

2. Where a small manufacturer, a leader in a new industry in which it has giant competitors, does not have the power to fix prices or to control competitors, and the jury is charged that the small manufacturer may be found to constitute a monopoly, is not the entry of judgment on a general verdict for the plaintiff reversible error?

3. Where the plaintiff's own evidence is materially contrary to allegations, as to which it has the burden of proof to establish a cause of action, should not the court, as a matter of law, deny recovery?

4. Where a plaintiff claims a federal antitrust violation in that the defendants caused it to dispose of its local community antenna television project, is there a sufficient showing of an effect upon interstate commerce merely because the defendants were engaged in the interstate sale of equipment for community antenna television systems?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved is the Seventh Amendment to the Constitution of the United States. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 2. The constitutional and statutory provisions appear in Appendix B.

STATEMENT OF THE CASE.

This is a private antitrust action in which the respondent, Wescoast Broadcasting Company, Inc. (herein called "Wescoast"), alleged that the petitioners, Jerrold Electronics Corporation (herein called "Jerrold") and Jerrold-Northwest, Inc. (herein called "Jerrold NW"), had been guilty of violations of sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2 and sections 3 and 7 of the Clayton Act, 15 U. S. C. §§ 14, 18. The jury returned a verdict in the amount of $97,500 which was trebled, and judgment, including an amount for attorneys' fees, was awarded Wescoast in the sum of $325,000. On appeal, the judgment was affirmed and an additional $5,000 attorneys' fees was awarded.

Jerrold, in the fall of 1950, and the Radio Corporation of America at about the same time (R. 751, 1704), began a new industry, i.e., the development and sale of electronic equipment for systems for community antenna television (herein called "catv"). A catv system in its simplest form consists of an antenna, electronic equipment and long lines or runs of cable from which tap-off wires are led into homes and other locations for connection to television receivers.

The new industry had remarkable growth. Jerrold's competition included the Radio Corporation of America, Philco Corporation, Blonder-Tongue, Spencer-Kennedy Equipment Laboratories, Entron, Inc. and Amplivision (R. 452, 1750). Notwithstanding this competition, Jerrold had supplied the electronic equipment for about two-thirds of the 227 systems in existence in July of 1953 (R. 247, 1852). Up until that time and for a short period thereafter, Jerrold and its distributors, including its affiliate, Jerrold NW, followed a general marketing policy established by its president and substantially sole owner, Milton J. Shapp (herein called "Shapp"). This policy was to sell elec-

tronic equipment to catv companies only on a full system basis and with a service contract (R. 248). Jerrold had grown from a small company established in 1948 with a capital investment of $500 (R. 1656) to a company with 70 to 100 employees in 1953 (R. 1657).

On March 19, 1952, Shapp entered into a written contract with J. H. Whitney & Co. and Fox, Wells & Company under which Jerrold would recommend projects for eventual construction and operation, in each case, by a new corporation in which Shapp would have a 25% voting stock interest and the other companies would have the remaining stock interest (R. 411). New corporations, under that arrangement in the two-year duration of the contract, built a total of only six projects in the entire United States:—three in the State of Washington, two in West Virginia and one in Pennsylvania (R. 777, 838).

Early in 1953, Wescoast and Jerrold, almost simultaneously, decided to make plans for independent catv systems in Wenatchee, Washington. It was conceded that in view of its size and population, Wenatchee could not support more than one catv system of the kind then contemplated (App. *infra* p. 9a). Jerrold recommended the project, and thereafter, a new corporation was formed pursuant to its previously described financial arrangement with J. H. Whitney & Co. and Fox, Wells & Company. Wescoast was delayed in getting a significant start on its project because of its unsuccessful attempt to get Jerrold electronic equipment and because of shortages which then existed in the supply of coaxial cable (R. 265).

Construction of the two competing systems was started about the same time (R. 183). Wescoast was the first to bring television signals into the town. It proceeded on a block-by-block plan according to a bootstrap method of financing construction from receipts on prior construction (R. 542-3). By February of 1954, it had wired about one-third of the town (R. 550). The new corporation, however,

had proceeded on a unified program and by February of 1954 had wired the whole town (R. 550).

In February of 1954, Wescoast and the new corporation wanted to terminate their competition, and negotiated with each other to buy or to sell (R. 820, 1355). Wescoast offered the new corporation $25,000 to remove its project, even though that corporation was ready to serve the whole town, and wanted $250,000 for the purchase of its project which was ready to serve only one-third of the town (R. 1355). After long negotiations, during which it consulted with counsel (R. 762) and with a competitor of Jerrold (R. 1526), Wescoast finally agreed to sell out to the new corporation upon terms which Wescoast's majority shareholder agreed were substantially what he wanted.[1] More than seven years later it brought this suit, contending that it suffered damages as a result of the sale, allegedly caused by antitrust violations.

The court opened the trial by reading to the jury from a statement, prepared by counsel for Wescoast, with respect to the law and issues involved. Counsel for Jerrold objected to such an opening address (R. 9, 41) and also attempted to make specific objection to the legal content of the address (R. 43). Among other things, the trial judge stated to the jury that the case involved the Clayton Act (R. 42, 43-4), which turned out to be incorrect; and stated further that any restraint of trade was unlawful, without making any reference to the rule of reason (R. 42).

Wescoast claimed at the trial that Jerrold was dominant in the industry in 1953 because it had a component known as an automatic gain control device which was not obtainable elsewhere. Wescoast's president, however, testified that it had ordered such devices from the Radio

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1. His only qualification was that the so-called run into town which cost Wescoast $50,000 was not bought (R. 1355-6), but both he (R. 1350-1) and Wescoast's other shareholder (R. 560) were of the opinion that the purchaser would have to come back to them to buy it.

Corporation of America in June of 1953, and had obtained delivery of such devices in August of 1953 from the Radio Corporation of America (R. 538). Furthermore, Wescoast's engineer testified that the technique of such devices was neither new nor novel (R. 236).

Wescoast claimed that Jerrold's insistence on a service contract caused a delay of its project, and that it was forced to sell out to the competition. Testimony offered by Wescoast, however, was that: (1) the sale was not due to the need for equipment (R. 261-2, 625-6, 1357); (2) Wescoast feared what the competition might do in the future (R. 1334); and (3) Wescoast's two principal shareholders had limited cash facilities and the larger shareholder preferred to use available cash for another project in which there would be no competition (R. 1375).

Over the specific objections of counsel for Jerrold, the judge charged the jury on monopoly. He also refused, as a matter of law, to decide that interstate commerce was not involved or to leave it to the jury to determine whether the alleged antitrust violations had any significant relation to interstate commerce.

Jerrold duly filed motions for judgment and for a new trial. After briefs were filed and argument thereon, the court below denied the motions without rendering any opinion. On appeal, the action of the court was upheld.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals Has Sanctioned Such a Departure From Procedural Rules and Usual Course of Trial by Jury as to Call for the Exercise of This Court's Power of Supervision.

Inherent rights incident to trial by jury have been of growing concern to this Court in recent years with respect to criminal trials. It has not had too many occasions to deal with such rights in civil cases. This is an appropriate case for the Court to exercise its power of supervision so as to clarify that in civil cases, as well as in criminal cases, the right to trial by jury includes the right to have the trial conducted in accordance with rules established by this Court and in accordance with long-accepted and usual judicial practices.

The petitioners did not, and do not, contend that there is a constitutional right to have jury trials conducted without change. It was pointed out in *Galloway v. United States,* 319 U. S. 372, 390 (1942) that the Seventh Amendment "did not bind the Federal courts to the exact procedural incidents" which had existed at the time of the adoption of the Amendment. The position of the petitioners is that rules of law govern the conduct of trials, and substantial departures therefrom at the sole instance of the trial judge should not be countenanced.

Objection was made twice to the opening statement by the trial judge on the ground that this was not his function at that time.[2] Thereafter, objection was made for the pur-

2. "MR. PACKEL: May I again, for the record, your Honor, state my objection to your——

THE COURT: You may. This is a complicated case, and I am going to give the jury an idea at this time of what the case is about so they will understand it.

MR. PACKEL: I merely point out that I consider that the function of the plaintiff's counsel in his opening statement. That is the reason for my objection, your Honor." (R. 41).

pose of having the judge correct his statement that any restraint of trade was a violation of the antitrust laws, but he refused to listen to any objection whatever about the points of law he was then giving to the jury.[3]

Rule 51 of the Federal Rules of Civil Procedure directs that the court shall inform counsel of its proposed action on requests for instructions, and specifically provides that "the court shall instruct the jury after the arguments are completed . . .". Thus, the pertinent rule adopted by this Court precludes any opening statement of points of law by the court. Neither a trial judge nor a court of appeals should be able to sanction a course of conduct inconsistent with rules adopted by this Court. Speaking of Rule 4(d) this Court has recently pointed out that ". . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Hanna v. Plumer*, U. S. Sup. Ct. (April 26, 1965).

Jury trial, as guaranteed by the Constitution, means the mode of trial according to rules and accepted practices. In *United States v. Sobell*, 314 F. 2d 314, 330 (2nd Cir. 1963) it is declared that "the guarantee is also of instructions to the jury by a judge who is assisted by appropriate requests on the part of the defendant." It is the function

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3. "MR. PACKEL: Pardon me, your Honor, need I——

THE COURT: You may have a continuing objection to this. I don't like to be continuously interrupted, sir.

MR. PACKEL: I just feel that I should make my record.

THE COURT: All right, you have made your objection. You made it to my doing this. I don't know why you have to continue it.

MR. PACKEL: I only rise at this point to make specific reference to the section of the law to which you have just referred.

THE COURT: You have an objection to all that I am doing at this time.

MR. PACKEL: I thought it my duty to point out a specific objection if I have one, your Honor." (R. 43).

of only this Court to fashion changes in jury trials. It might be that some day there will be a change as to the time for charging a jury, see *Prettyman, Jury Instructions —First or Last?* (1960), 46 Am. Bar. Ass. J. 1066, but not until this Court speaks.

This issue of a judge's opening statement cuts much deeper than mere indoctrination of a jury, which has had an interesting development, see *The Jury System in the Federal Courts, Handbook for Jurors,* 26 F. R. D. 409, 460 (1960) and an extensive *Note, Indoctrination by court of persons summoned for jury service* (1963), 89 A. L. R. 2d 197. This Court has not passed on that question, but the practice has grown for the apparent reason that mere indoctrination of a jury is not a clear violation of the normal and accepted conduct of a jury trial and, of equal importance, it violates no rule approved by this Court.

The Court of Appeals in this case did not pass upon the propriety of the trial judge's opening statement, but concluded that the defendants did not establish any prejudice therefrom. Jerrold's position, primarily, was and is that the trial judge's conduct was such a fundamental departure from the accepted and usual course of judicial proceedings and such a violation of rules established by this Court that it was *per se* prejudicial.

Neither Rule 61 of the Federal Rules of Civil Procedure nor the Act of May 24, 1949, C. 139 § 110, 63 Stat. 105, 28 U. S. C. § 2111, are controlling because they both call for a disregard of only those errors "which do not affect the substantial rights of the parties". No litmus test can determine whether an improper practice has affected the substantial rights of the parties. Thus, it has been held that the violation of a part of Rule 51, in not permitting exceptions outside the hearing of the jury, may or may not be prejudicial, depending upon the circumstances, *Swain v. Boeing Airplane Company,* 337 F. 2d 940 (2d Cir. 1964), cert. den. March 29, 1965. The opening of the trial by the judge's statement to the jury was tantamount

to a charge to the jury and, of itself, should be deemed a fundamental and substantive interference with the rights of the parties. It has been pointed out with respect to noncompliance by the court with Rule 51, in refusing to inform counsel as to how the jury would be charged on controversial points, that "the failure of the court to observe either the letter or the spirit of the rule was prejudicial error." *Downie v. Powers,* 193 F. 2d 760, 767 (10th Cir. 1951). Although the issue here is different, the same Rule is involved and the departure from the Rule and from the accepted practice is much more flagrant.

Centuries of jury trials have brought about practices which should not be departed from except by rules of law, duly adopted. Substantive rights frequently turn on procedural safeguards. "Moreover, lawyers know, if others do not, that what may seem technical may embody a great tradition of justice," *Kotteakos v. United States,* 328 U. S. 750, 761 (1946). Overzealousness by a judge in departing from fundamental practices governing his conduct breeds disrespect of the law, which this Court should strike down whether or not a party can actually prove prejudice.

If there were a need to show prejudice, there is the fact that during the several weeks of trial the members of the jury were hearing and considering evidence with improper law in their minds, as given them so authoritatively by the judge. He had instructed them that any restraint of trade was violative of the antitrust laws. How could it be proved that the jurors did not give any heed to that statement of the law and were influenced only by the final charge which contained a host of legal points? It would be strange to say that a jury can be given misinformation at the beginning of a trial, on the premise that in the end it will be properly informed. "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Kotteakos v. United States,* 328 U. S. 750, 764 (1946). At the very least there is a reasonable probability that the opening statement of the trial judge

contributed to the determination of the jury that the defendants were guilty of a violation of the antitrust laws.

2. The Court of Appeals Decided Two Questions of Federal Law Contrary to Applicable Decisions of This Court.

A. The Improper Charge of Monopoly.

Jerrold was a small manufacturer competing, at the time in question, with such giants as the Radio Corporation of America and the Philco Corporation. Even though there was no evidence of any power in Jerrold to fix prices or to control competitors, the Court of Appeals sustained a charge that the jury could find that Jerrold constituted a monopoly. This Court has established the rule that the power to fix prices or to control competition is a *sine qua non* of monopoly, *United States v. E. I. DuPont De Nemours & Co.*, 351 U. S. 377 (1956); *cf. National Wrestling Alliance v. Myers*, 325 F. 2d 768 (8th Cir. 1963); *United States v. Consolidated Laundries Corp.*, 291 F. 2d 563 (2d Cir. 1961).

Specific objection was made to any monopoly charge on the ground that it had no evidentiary basis,[4] but the charge was nevertheless given (R. 2073-6). The Court of Appeals dealt with the issue by merely making a general reference to what it had previously said (App. *infra* p. 21a). Its only reference to a possible monopoly, however, in what was agreed upon as the relevant market,[5] was its statement

4. "Well, I do want to object, and I think you won't agree, your Honor, but for the record I object to any charge about monopoly or monopolization because I don't think the facts warrant any charge with respect to monopoly or monopolization." (R. 2007-8).

5. The stipulation agreed to by the parties and read to the jury was (R. 247): "It is agreed that the relevant market in 1953 and 1954 was the demand for community television antenna equipment for community television antenna systems." The Court of Appeals erroneously spoke of the relevant market of cities in the Northwest (App. *infra*, p. 18a). Yet, even in that regard the only testimony was that at the time in question there were 75 to 80 catv systems in the Northwest, and Jerrold and Shapp had an interest in only four of those systems (R. 1875).

that Jerrold in July of 1953, and no one else, had automatic gain control equipment (App. *infra* p. 3a). Directly to the contrary, Wescoast's president testified that such equipment was received from the Radio Corporation of America in August of 1953 and that it had been ordered from the Radio Corporation of America months before (R. 533-8). It was only in 1953 that even Jerrold started to market such equipment (R. 367). In addition, Wescoast's engineer testified that automatic gain control was not novel in electronic equipment and that he could have easily built it (R. 236-7). Under such circumstances, it could not properly be found that Jerrold controlled the market, even though it was first in making such equipment for catv systems.

The general verdict of the jury may well have rested on this erroneous theory of Jerrold's liability as a monopolist. The Court of Appeals, therefore, erred in upholding the verdict, and should be reversed, *Sunkist Growers v. Winckler and Smith Co.*, 370 U. S. 19 (1962); *Markley v. Baldwin*, 112 U. S. 490 (1884). Similar reversals, dealing specifically with an erroneous charge of monopoly followed by a general verdict for the plaintiff, appear in *National Wrestling Alliance v. Myers*, 325 F. 2d 768 (8th Cir. 1963) and in *Volasco Products Company v. Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (6th Cir. 1962).

B. The Necessity for a Significant Relation Between the Alleged Violation and Interstate Commerce.

A plaintiff, in a federal antitrust suit, must show that the conduct about which it complains, or the impact thereof, has some significant relation to interstate commerce. An alleged local restraint or a claim of monopoly of a local service, even though the defendant is otherwise engaged in interstate commerce, is not a violation of the Sherman

Act, *United States v. Yellow Cab Co.*, 332 U. S. 218, 233 (1947). Wescoast's system carried signals which may have come from outside the State, but it was, in effect, merely furnishing a long electronic antenna, located entirely within the State of Washington, connected to television sets of subscribers located entirely within that State. Five recent appellate decisions are consistent with the *Yellow Cab* case and inconsistent with the opinion of the Court of Appeals in this case as to the issue of whether there was an interstate violation. *Lieberthal v. North County Lanes, Inc.*, 332 F. 2d 269 (2d Cir. 1964); *Evanston Cab Co. v. City of Chicago*, 325 F. 2d 907 (7th Cir. 1963), cert. den. 377 U. S. 943 (1964); *Gordon v. Illinois Bell Telephone Company*, 330 F. 2d 103 (7th Cir. 1964); *Hotel Phillips, Inc. v. Journeymen Barbers, etc.*, 301 F. 2d 443 (8th Cir. 1962); *H. E. Fletcher v. Rock of Ages Corp.*, 326 F. 2d 13 (2d Cir. 1963).

The trial judge refused to hold as a matter of law that there was an insufficient relation to interstate commerce and even refused to put the issue to the jury. He relied on *Klor's Inc. v. Broadway-Hale Stores Inc.*, 359 U. S. 207, 212 (1959).[6] He disregarded the distinction that it dealt with "concerted refusals by traders to deal with other

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6. "THE COURT: It is pretty clear on that particular issue.

MR. PACKEL: That is talking about someone who is in the business of selling these goods in interstate commerce, whereas here you are talking about a community antenna company, which is just serving people in the community.

THE COURT: Do you have any authority for making that distinction, Mr. Packel?

MR. PACKEL: In my brief I gave you the cases that dealt with the example of the bowling alley where there was some question. As I recall, the decision of the Court said that the amount of interstate commerce that was affected where you did something with respect to one bowling alley was insignificant in the amount of interstate commerce. I meant the distinction where what is being done is being done to someone that is merely in a purely local activity in contrast to where you have got someone doing something to a dealer who is buying things that are moved in interstate commerce and selling them to the public." (R. 1965-6).

traders . . ." in goods which had moved and in goods which would move in interstate commerce. The Court of Appeals gave as its reason for affirmance that the interstate character of the commerce involved was stipulated and it was conclusively shown to be substantial (App. *infra* p. 22a). The stipulation, however, was merely that Jerrold manufactured and sold equipment for catv systems in interstate commerce throughout the United States (R. 133), and it is admitted that the amount of its interstate commerce was substantial. That, nonetheless, does not mean that the local conspiracy about which Wescoast complained had any significant relation to interstate commerce. If, as agreed (App. *infra* p. 9a), the town could have only supported one system, then the temporary duration of the competition increased, rather than decreased, the flow of goods into the State. A local tort by an interstate company is not necessarily a violation of the Sherman Act. "That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch,* 325 U. S. 821, 826 (1945).

3. The Important Question of Federal Law as to the Binding Effect Upon a Party of Evidence Offered by It Should Be Settled by This Court.

A recurring problem in the trial of cases is the application of the rule with respect to evidence offered by a party which is inconsistent with the position of that party. The specific aspect of that problem which this case presents, and which is apparently unresolved by this Court, is whether contradictions in the evidence which is offered by a plaintiff as to substantive matters on which it has the burden of proof are not so binding as to preclude recovery. The Court of Appeals took the position, "We know of no such rule" (App. *infra* p. 22a). Yet, there are legions of

cases which have treated the rule and its various qualifications, depending upon special circumstances such as inadvertent or mistaken statements, objective as opposed to subjective statements, statements of opinion, or statements of unwilling or hostile witnesses.

The petitioners do not contend for the old common law rule that a party so vouches his own testimony and that of his witnesses, that he is conclusively bound by what he or they say on the witness stand.[7] The rule for which the petitioners do contend is that where a party's own evidence, if true, would defeat his right to a verdict, and such evidence is not modified or explained, he is not entitled to a verdict. *Bolam v. Louisville and Nashville Railroad Company,* 295 F. 2d 809 (6th Cir. 1961); *Martin v. E. I. duPont De Nemours & Co., Inc.,* 281 F. 2d 801 (3d Cir. 1960); *Barnett v. Terminal Railroad Ass'n.,* 228 F. 2d 756 (8th Cir. 1956), cert. den. 351 U. S. 953 (1956); *Kansas Transport Co. v. Browning,* 219 F. 2d 890 (10th Cir. 1955); *Howard v. Swagart,* 161 F. 2d 651 (D. C. 1947); *L. P. Larson, Jr. Co. v. Wm. Wrigley, Jr. Co.,* 253 Fed. 914 (7th Cir. 1918). Hosts of State cases are cited in a *Note, Binding effect of party's own unfavorable testimony* (1947), 169 A. L. R. 798.

The rule of these cases is directly applicable to the testimony of Wescoast's president and vice-president, its sole shareholders. In addition, the rule is applicable because of certain testimony by Wescoast's employees as well as by other persons offered on its behalf. Illustrations of many significant matters as to which Wescoast had the burden of proof, and yet its evidence was contrary to its allegations, are the following:

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7. Hand, J., in *Lowy v. C. I. R.,* 288 F. 2d 517, 520 (2d Cir. 1961) pointed out that this notion has been thoroughly discredited.

Plaintiff's Claims	*Evidence Offered by Plaintiff*
1. Sale in February of 1954 was due to need for Jerrold equipment.[8]	(a) Plaintiff's president: sufficient other equipment was already available in December of 1953 (R. 625-6).
	(b) Plaintiff's vice-president: no need for Jerrold equipment in February of 1954 (R. 1357).
	(c) Plaintiff's engineer: by August of 1953, there was no need for Jerrold equipment (R. 261-2, 268-9).
2. Conspiracy not to sell to plaintiff.	(a) J. H. Whitney partner: there was no agreement not to sell (R. 771-2).
	(b) J. H. Whitney employee: there was no agreement not to sell (R. 796, 884).
	(c) Manufacturers' representative: refused to agree not to sell (R. 347).
3. Monopoly because of automatic gain equipment.	(a) Plaintiff's president: such equipment ordered in June and received in August of 1953 from RCA (R. 533, 538).
	(b) Plaintiff's engineer: it was not new or complicated and could be home-made (R. 236-7).

8. The trial judge referred to this as a critical issue (R. 1181).

Plaintiff's Claims	*Evidence Offered by Plaintiff*
4. Lack of Jerrold equipment rather than cable was the cause of delay until September of 1953.	(a) Plaintiff's president: the required cable did not arrive until September of 1953. (b) Plaintiff's engineer: could not say whether lack of cable or whether lack of Jerrold equipment caused most of the delay (R. 265).
5. Sale was forced by defendants.	(a) Plaintiff's president: gave specific reasons for sale unrelated to any coercion (R. 557-8, 602, 1526). (b) Plaintiff's vice-president: preference to use funds for another non-competitive project (R. 1375). (c) Plaintiff's vice-president: to avoid competition wanted to buy or sell and they substantially met his price (R. 1355-6).

Although this Court may not have specifically spoken on the direct effect of a verdict for a plaintiff which is inconsistent with the evidence offered by the plaintiff, the answer seems clearly governed by *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 340 (1933), where the Court quoted with approval:

> "When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to main-

> tain one of those propositions against the other is necessarily wrong."

This also appears to be but a corollary of the rule stated in *Brady v. Southern R. Co.*, 320 U. S. 475, 479-80 (1943), that:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

The plaintiff's own case as presented to the jury is a story of competition, somewhat similar to illustration 4 in section 709 of the *Restatement of the Law of Torts* (1938), p. 527. The plaintiff wanted to be the only catv operator in Wenatchee, but it was unable to achieve that. "The general objective of the antitrust laws is promotion of competition in open markets." *Report of the Attorney-General's National Committee to Study the Antitrust Laws* (1955), p. 1. The words of Hand, J. in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 430 (2d Cir. 1945), are quite appropriate: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[9]

The petitioners recognize that this Court cannot be expected to engage in a general review of determinations relating only to the sufficiency of the evidence to warrant the submission of issues to a jury. In this case, however,

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9. In *Clark Marine Corporation v. Cargill, Inc.*, 226 F. Supp. 103 (D. La. 1964) the court concluded as a matter of law, in view of the lack of a preponderance of evidence to the contrary, that the business failure of the plaintiff did not result from antitrust violations but probably resulted from poor management and from the plaintiff's own under-capitalization.

the question is the disregard by the courts below of a legal rule as to the significance of testimony offered by the plaintiff. As a safeguard of trial by jury, litigants are entitled to have the jury pass on issues of fact. Of comparable importance is the right of litigants to have issues withdrawn from the jury because of pertinent rules of law which call for the disposition of a case by the court itself.

CONCLUSION.

Safeguarding material rights of trial by jury is of high public concern in civil, as well as in criminal, proceedings. Likewise, it is of public concern that the heavy hand of the antitrust law should not be laid upon businessmen contrary to principles of law established by this Court. These public concerns warrant the review by this Court which is sought by the petitioners as a matter of grave private concern to avoid a miscarriage of justice. For these reasons, the petitioners respectfully request that the petition for certiorari be granted.

ALEX SATINSKY,
ISRAEL PACKEL,
Counsel for Petitioners.

May 14, 1965.

APPENDIX A.

OPINION.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

JERROLD ELECTRONICS CORPORATION and JERROLD-NORTHWEST, INC.,
Appellants,
v.
WESCOAST BROADCASTING COMPANY, INC., a Washington corporation, d/b/a KPQ Radio,
Appellee.
No. 19,343

[Jan. 22, 1965]

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Before: CHAMBERS, POPE and KOELSCH, *Circuit Judges.*

POPE, *Circuit Judge.*

This is a private antitrust action wherein the plaintiff, Wescoast Broadcasting Company, Inc., alleged that the defendants Jerrold Electronics Corporation and Jerrold-Northwest, Inc., had been guilty of violations of §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2.[1] After trial the

1. As originally filed, the complaint also charged violations of §§ 3 and 7 of the Clayton Act (15 U. S. C. §§ 14, 18). At the trial plaintiff abandoned its claim under the latter two sections and the case was submitted to the jury under §§ 1 and 2 of the Sherman Act.

jury returned a verdict in favor of the plaintiff assessing plaintiff's damages in the sum of $97,500 which was trebled, and judgment, including an award of $32,500 as attorneys' fees, was awarded plaintiff in the sum of $325,000. The defendants have perfected this appeal from that judgment.

About the end of 1950 Jerrold Electronics Corporation (here called Jerrold) began the manufacture and sale of community television antenna systems. The parties stipulated that the following is a description of the nature and purpose of such systems. "Community television antenna systems are constructed in communities remote from television broadcasting stations and enable inhabitants of such communities to view television programs emanating from said television broadcasting stations. Television signals travel in straight lines. At a distance remote from a television broadcasting station the curvature of the earth causes the path of the signal to lead off into space. In order to capture the signal, a community antenna, which is a giant receiving tower, is usually constructed on the highest point near the area to be served. The signals picked up by the antenna are amplified and transmitted by cable to the community. This cable is normally strung along telephone and power company poles throughout the community and connected by smaller cable or feeder lines to television sets located in the homes of those persons desiring to be served by the system. The operators of community television systems usually charge those desiring service from the system an initial hook-up fee and a smaller monthly service charge payable as long as they are served by the system." It was also stipulated that Jerrold manufactured and sold such systems in interstate commerce throughout the United States.

By July, 1953, somewhere between two-thirds and four-fifths of all such systems in the United States were supplied exclusively with Jerrold equipment. At that time, which is the time relevant to this controversy, Jerrold had thus become a dominant figure in the manufacture of such

community antenna systems. One feature of the Jerrold system was a component known as its AGC (automatic gain control) device. This component, during the time hereafter referred to, was as a practical matter essential to the construction of a fully effective antenna system. It was not obtainable elsewhere.[2]

In selling its systems Jerrold had followed a general policy under which none of its equipment would be sold to a community television antenna operator unless the buyer agreed to purchase all of the equipment of his system from Jerrold. The buyer was also required as a condition of such purchase to enter into a service contract with Jerrold. This contract provided that Jerrold would perform engineering services with respect to the layout, installation and operation of the system, for which services it was to receive fixed sums and installment payments payable out of the income receipts of the system operator.[3] Distribution of Jerrold equipment in the Northwest (Washington, Oregon, Idaho and Western Montana) was handled through Jerrold-Northwest, Inc., here called Jerrold-Northwest. Sixty-five percent of the stock ownership of Jerrold-Northwest was in the control of Jerrold. The remainder of said stock was owned by Phillip D. Hamlin and Ron Merritt who were officers of the company. Shapp, president of Jerrold, was president of Jerrold-Northwest.[4] Elsewhere throughout the United States similar subsidiary corporations were

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2. A community antenna system, without the AGC component, would be required to control the output of its signal through the use of an operator using manual control. Without such control the signals would so vary in intensity as to prevent adequate transmission of television images.

3. The payments required were $5 for each "connection", that is, for each subscriber under the system, with 25 cents per subscriber per month for as long as the connection continued.

4. In the early part of 1953 Hamlin and Merritt were operating a concern known as Video Associates. It appears to have been operated in conjunction with Jerrold but after some 60 days it was dissolved and Jerrold-Northwest formed to take its place.

established for the purpose of controlling the distribution of Jerrold's manufactured equipment and components.

In 1952 a television broadcasting station was established at Spokane, Wash. In consequence of this it became feasible to operate a community antenna system at Wenatchee, Washington, and early in 1953, Wescoast Broadcasting Company, Inc., (here called Wescoast) prepared to establish such a system at Wenatchee. At that time Wescoast was operating a radio station at Wenatchee using the call letters KPQ. James W. Wallace, a stockholder, was president of Wescoast, and Rogan Jones of Bellingham, Wash., was the majority stockholder. Jones had constructed a community television antenna system at Bellingham which was then in operation. In anticipation of the establishment of the Wenatchee system, Wescoast contacted Video Associates, predecessor of Jerrold-Northwest, the distributors of Jerrold equipment, for the purpose of procuring Jerrold equipment and components for its Wenatchee system.

At first Wescoast received a communication from the distributor indicating its willingness to supply the complete Jerrold system. This was by a letter dated February 16, 1953. Wescoast submitted a purchase order for this equipment. While this order was waiting to be filled, Merritt was in the East having a conference with Shapp, president of Jerrold. Shapp and Merritt discussed among themselves and also with representatives of J. H. Whitney & Co., here called Whitney, of New York, the possibility of putting into effect in the Northwest area an arrangement which Shapp had made with Whitney in March, 1952. The matter was also discussed at the same time, by telephone, with Hamlin, with one Brown, representing Whitney, and one Tucker, representing Jerrold. At that March, 1952, date, Shapp had proposed to Whitney that the latter assist in the development of community television antenna systems in a number of different sections of the country. The agreement was that Shapp, representing Jerrold, and Whitney

would mutually agree upon a list of communities in which the establishment of such systems appeared to be feasible. Whitney would pay for preliminary surveys and field tests; Shapp would assist in the survey and prepare reports, and then Whitney would decide whether to proceed with an installation of a system in a given community. If such a decision were made Whitney would cause a corporation to be organized to install and operate the system. In that event Whitney would supply the necessary funds to finance the system, Whitney and his associates would acquire a 75% common stock interest in the corporation, and Shapp and his associates would receive a 25% common stock interest. The agreement was to cover the entire United States with the exception of the State of Maine.

This was the investment plan which Shapp and Merritt and the others mentioned discussed while the Wescoast order for the Jerrold equipment was still pending and not yet filled. In that discussion Merritt, the Whitney interests, Shapp and Hamlin considered a program whereby they would make a survey of some 12 to 15 communities in the Northwest with a view to carrying out the Shapp-Whitney plan. Hamlin, Brown and Tucker then proceeded to make surveys of certain towns in Idaho, Washington and Oregon. It was ascertained that Whitney was interested in certain towns in Idaho and Washington, including the town of Wenatchee.[5]

The trip of Merritt to the East, during which these conversations and discussions occurred, took place in March, 1953. It would appear to be significant then that on March 31, 1953, Hamlin, on behalf of Video Associates, which, it will be recalled, had received Wescoast's purchase order for Jerrold community antenna system equipment, wrote

5. Shapp, in his testimony below, listed such towns as Lewiston, Idaho, and Richland, Kennewick, Pasco, Wenatchee, Clarkston and Walla Walla, in Washington. He testified that these met the criteria described in the arrangement with Whitney and stated that Whitney was interested in investing in community antenna systems in those places.

to Wescoast referring to that order and advising the latter that although Hamlin's concern had already scheduled this material to be shipped direct from the Jerrold factory, Hamlin had recently received information from Jerrold having a direct bearing on the order and upon any subsequent orders that Wescoast might make which would prevent the delivery of this equipment as per the order. In this letter Wescoast was informed that Jerrold offered in conjunction with all of their community antenna installations a comprehensive service contract of the character which we have previously described, and that Jerrold would not sell any of their equipment except in connection with such a service contract. Hamlin stated that he did not propose to debate with Wescoast the question of the latter's fitness to install the equipment without such a service arrangement but that since the condition on sales was imposed by Jerrold the order could not be filled.[6]

Simultaneously Merritt sent a copy of the letter, also dated March 31, 1953, which began as follows: "Please note enclosed copy of a letter written to Rogan Jones specifically in regard to the Wenatchee deal. Relative to this, please see that no merchandise is drop-shipped to Wenatchee, Washington on our purchase order #9890 (unless same is already on the way). And, of course, you know that our writing of this letter is in a way to serve a double purpose, and that is to set this deal up for the Whitney interests. Better file this particular letter in the waste basket after you read it for obvious reasons."[7]

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6. The reason given in this letter for Jerrold demanding this tie-in was that when its equipment had been installed without provisions for performing the servicing and engineering work called for by the service contracts, citizens, complaining of defective transmission and of defective service, had sued or threatened suit against the antenna companies naming Jerrold as a codefendant in the suit. It was said that to avoid this sort of thing Jerrold was insisting on the service contract permitting it to perform all engineering services in connection with the operation and installation of the antenna systems.

7. This letter then went on to discuss the general question of the feasibility and desirability of the tie-in of the service contract with

It seems plain that these letters furnish a key to what Hamlin, Merritt and Jerrold were up to. As stated in the letter of transmission to Jerrold, to which we have referred, the writing of that letter was "to serve a double purpose and that is to set this deal up for the Whitney interests." In short, the purpose was not to induce Wescoast to agree to sign the service contract but rather to induce Wescoast not to buy the Jerrold equipment. In that manner Wescoast would be denied whatever advantages were attainable from such equipment. This is made doubly clear by a letter written by Merritt to Jerrold on April 14, 1953, in which he said, referring to Jerrold's attitude toward selling the community antenna system with the service contract included as a package, "I hope you were not too concerned over the text of the letter we wrote to [Wescoast]. Where would the Whitney boys have been in the Wenatchee deal if I had 'sugared' this letter up to the point where he took up our service contract instead of skipping the whole deal."[8]

It thus seems reasonably clear that after Hamlin and Merritt had been advised of the arrangement between

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sales of Jerrold equipment. Merritt stated: "I am still not completely convinced that you have the legal right to hang a service contract on to the sale of all your merchandise," but the writer proceeded to assure Jerrold that he, Merritt, would continue to be insistent upon purchasers signing the service contract. The letter also suggested the advisability for procuring legal advice as to alternative methods of protecting Jerrold against possible suits by persons who might allege that Jerrold equipment had been improperly installed.

8. The letter went on to suggest that the service contract could be sold to the purchasers in a much more attractive manner if emphasis were placed upon the benefits to the operator of the system rather than merely emphasizing Jerrold's desire to avoid law suits. This letter was written in response to one received by Merritt from Jerrold in which the same thought was expressed as follows: "On the letter to Mr. Jones over Phil's signature, it is my understanding from our conversations that this letter was written in the terms that it was for reasons other than those that appear on the surface. Even under such circumstances, it is inadvisable, it seems to me, to indicate that the major reason for the Service Contract is for Jerrold to protect itself against suit."

Shapp and Whitney for the development by them in the manner previously mentioned of the sundry community antenna systems in these Northwest cities, Hamlin and Merritt undertook to see to it that Wescoast would not get the Jerrold equipment they had ordered and that this would come about not by a simple refusal to sell to them but through Wescoast's refusal to buy because it did not want to accept the "bitter pill" tie-in of the service contract.[9]

Hamlin made this very clear in his testimony at the trial. Asked as to what was the "double purpose" behind the writing of the letter to Wescoast advising as to the necessity of the service contract as a condition for receipt of Jerrold equipment, he said that writing the letter as he did would in his opinion at the time "resolve the conflict in Wenatchee, because in my opinion, Mr. Jones would not accept the maintenance and service contract." He testified that all these matters and the objectives of this notification to Wescoast had been discussed with Tucker and Brown prior to the sending of the letter. That these objectives were accomplished is indicated in a letter from Hamlin to Tucker dated April 6, 1953, in which Hamlin said "KPQ Wenatchee, our competitor, has chosen to abandon Jerrold equipment rather than sign a Jerrold Maintenance and Service Agreement. They state they will make their own equipment. Of interest is their further observation that this will 'delay them considerably.'" As will shortly appear these maneuverings by the defendants accomplished not only delay but complete frustration for Wescoast.

The facts show what was in substance a refusal to let Wescoast have Jerrold equipment. Plainly defendants' object was to see to it that Wescoast should not get the equipment under any circumstance, not even by signing a service contract. That this was done with a view to setting up the town for the development of a rival system by the Whitney-Shapp interests seems clear. It also seems clear that Whit-

9. In Merritt's letter of April 14, 1953, to Jerrold, mentioned above, he stated "You will have to admit that the service contract in its present form is a very bitter pill."

ney was participating in this plan of putting obstacles in the way of Wescoast so that it could take over the construction of the community television antenna system in Wenatchee. Hamlin testified at the trial as follows: "Mr. Brown [representing Whitney] was very, very concerned about Jerrold equipment already known by him to be in the hands of the KPQ system, the opposing system, and he imposed upon me as a condition of his recommending Wenatchee that I assure him that the opposition would not get Jerrold equipment. I told him that the only assurance I could give him was my foreknowledge that Mr. Jones was not going to sign the Maintenance and Service agreement, and that I felt that this was a very strong reason for his not being concerned about the opposition having Jerrold gear." [10]

At about the same time, the Jerrold-Whitney group formed a corporation to construct the contemplated community television system in Wenatchee. This corporation was named Wenatchee Television Cable Corporation. Brown of Whitney was president, Hamlin was vice-president, and, as previously indicated, the stock was divided between Shapp and Whitney with the latter having 75 percent and Shapp and his designees 25 percent.

It was known (and the fact is conceded) that in view of its size and population Wenatchee would not support more than one community television system of the kind then being contemplated. Wescoast, being unable to procure Jerrold components, was obliged to look elsewhere for substitute parts and was being considerably delayed. As soon as the Jerrold-Whitney corporation was formed it entered upon an advertising campaign announcing that its system would be constructed within six to eight weeks and that it

10. About this time Video Associates, Inc., which had been operating as distributor for the Jerrold equipment in the Northwest, was replaced by Jerrold-Northwest, as previously indicated, Jerrold having 65% of the stock, the remainder being owned by Hamlin and Merritt; Shapp, president of Jerrold, became president of Jerrold-Northwest, and Hamlin and Merritt also became officers of the company.

would be built with the superior Jerrold equipment which supplied 80 percent of community antenna systems in the country. Brown, representing the Whitney interests, had gone to Wescoast and indicated that the Whitney people were coming into Wenatchee to compete. Jones of Wescoast got the same information from Shapp. Shapp and Whitney indicated to Jones that the Shapp-Whitney interests "had all the money in the world and knew more than anybody else in the world and we had better shut up, leave them alone and go fishing."

That these efforts to talk Wescoast out of continuing in business in Wenatchee were pursuant to a general area-wide plan and arrangement between the Jerrold-Whitney, Hamlin, Merritt groups, is indicated by other evidence in the record. Thus the witness McCaw, who in 1953 had received a franchise for the construction of a community television system in Walla Walla, which was one of the cities toward which the Jerrold-Whitney interests were looking, had attempted to get some equipment for the construction of his contemplated system and in that connection had a conversation with Hamlin. Hamlin told McCaw that such equipment would not be available to McCaw from Jerrold suppliers unless McCaw entered into a service contract with Jerrold and unless he agreed to use Jerrold equipment exclusively. At that time Hamlin said to McCaw that "unless we did enter into this agreement with them, that they would see that a competitor came in and got into competition with us, and used the name of J. H. Whitney & Co." McCaw did not acquire Jerrold equipment and Whitney entered the area with the contemplated system.

McCaw also attempted to install a community television system in the Richland-Kennewick-Pasco area about the second quarter of 1953. He was one of three stockholders in a corporation organized for that purpose. They started construction of their system and attempted to purchase equipment from Hamlin, seeking Jerrold equipment, and Hamlin again stated that "unless we signed a service con-

tract with Jerrold and agreed to all of its terms and conditions, that no equipment would be available to us." Again this witness testified that Hamlin threatened that if McCaw and his group would not sign the service agreement "that they would bring in J. H. Whitney & Co. to compete with us, which they did." The result was that McCaw and his group stayed in Pasco and Kennewick and the Whitney group constructed in Richland, although all three places could have been served by a single system.

Correspondence in the record indicates that similar competition from an "eastern financial group" was threatened in communications to local operators in the Livingston-Bozeman area of Montana. The record indicates that in this case the Bozeman-Livingston parties reached an agreement with the Jerrold-Whitney interests upon a cooperative arrangement whereby Jerrold equipment would be used in that area, and that this arrangement was the result of threats similar to those previously mentioned.

In Wenatchee, Wescoast was making an effort to complete its system by constructing Cables and making connections with prospective customers, but because of delays incident to its inability to procure the equipment which it had vainly tried to procure from Jerrold, it finally reached the point early in 1954 where it had covered but one-third of the town while the rival Jerrold-Whitney concern, Wenatchee Television Cable Corporation (whose name was changed to Consolidated Television Cable Corporation, here called Consolidated), had completed a system covering the entire town.

The evidence shows that Wescoast had been delayed for a period of months by having its anticipated supply of Jerrold equipment cut off. It was dealing with other manufacturers but it was impossible to procure suitable equipment from them on time. Because of this delay Wescoast was finding it increasingly difficult to sign up customers who were being attracted to the Consolidated system because of the latter's rapid development which was the re-

sult of its more abundant financial resources and its access to Jerrold equipment.

It was then, early in 1954, that Wescoast despaired of being able to continue the struggle. Among other difficulties was the threat of a rate war through Consolidated's proposals to make connections for customers without charge. Wescoast had counted on receiving connection charges from customers in order to finance the completion of its system. It was simply short of money.[11] Wescoast and Consolidated then began negotiations which finally resulted in Wescoast selling out to Consolidated.

The plaintiff's theory respecting damages was that this sale had been forced by the wrongful acts of the defendants and that in consequence plaintiff had been damaged to the extent that the fair value of its assets exceeded the sum which it had received on the sale. The question of proof of damages and the proper measure thereof will be discussed hereafter.

Upon this appeal it is asserted by the appellant that Wescoast's giving up its project to Consolidated was not actionable because that sale was not caused by Wescoast's needs for Jerrold equipment, and that the defendants' conduct was not the proximate cause of such sale. It is further asserted that there was no antitrust violation; that the

11. Defendants and their associates kept a sharp lookout for Wescoast's increasing difficulties. On June 18, 1953, a Whitney inter-office memorandum noted of Wescoast that "This group has only one connection thus far and being unable to buy Jerrold equipment, is planning to use Telemeter or other untried equipment," and that its quality of construction was "extremely poor." On August 7, 1953, Whitney wrote a lengthy letter to a Wenatchee Television set dealer explaining the great superiority of the Whitney-Jerrold system over the competing system, suggesting that the latter cannot "be operated successfully as a tag-on to some other business," evidently referring to Jones' and Wallace's radio station. On October 16, 1953, Brown wrote his attorneys at Wenatchee inquiring whether he could find out where Jones had obtained some money the latter had "obviously obtained to complete his system." On November 9, 1953, Petersmeyer of Whitney wrote to Brown: "It sounds as though your friend [Jones] is running out of steam."

insistence of the defendants on a tie-in of a service contract was reasonable and fully justified; and that there was no proof of an attempt to monopolize and no evidence of a conspiracy to restrain trade.

When we consider the evidence in this case in the light most favorable to the prevailing party, as we must do, we are convinced that we have here an abundance of evidence of antitrust violations on the part of the defendants. With respect to the alleged conspiracy in restraint of trade we think the evidence discloses clearly a concerted refusal on the part of Jerrold, Shapp, Jerrold-Northwest, Hamlin and Merritt to sell Jerrold equipment to Wescoast, or concerted action to see to it that Wescoast did not purchase such equipment, in which conspiracy Whitney participated. As was stated in Klor's v. Broadway-Hale Stores, 359 U. S. 207, 212, "[C]oncerted refusals by traders to deal with other traders have long been held to be in the forbidden category", that is to say, "unduly restrictive, and hence forbidden by both the common law and the statute."

Another respect in which the conduct of the defendants appears to have been a deliberate undertaking to accomplish illegal results, and to restrain trade, was the use of the device of a tie-in of a service contract.[12] Jerrold, as we have noted, had a dominant position in the business in which it was engaged in the marketing of community television antenna systems, the relevant market here. It was dominant not merely because of the volume of its business, or because the vast majority of all such systems had been equipped with Jerrold components, but also because some of the equipment vital to such a system was exclusively available through it, such as the AGC components previously mentioned. This actual dominance was specifically apparent in the case of the dealings with Wescoast for the latter was delayed for a period approaching six months

12. The evidence also indicates that the defendants attached to sales of Jerrold equipment a further requirement that television antenna stations use exclusively Jerrold equipment.

in getting its system under way because it could not supply its needs elsewhere.

There are a substantial number of decisions which hold that such tie-in agreements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market, for the tied product and a 'not insubstantial' amount of interstate commerce is affected." Northern Pac. R. Co. v. United States, 356 U. S. 1, 6. As stated in International Salt Co. v. U. S., 332 U. S. 392, 396, such arrangements which foreclose competitors from any substantial market are per se unreasonable because they "tend to create a monopoly."

The trial court did not rule that the tie-in arrangement was per se a violation of the Act as the cases just cited might have authorized it to do.[13] The court's instruction to the jury on the tie-in problem was as follows: "Now, it is presumed to be a violation of the antitrust laws for a seller to refuse to sell a product except on the condition that the buyer also purchase from the seller some other product, or service, which the buyer does not want or need, where the effect is to substantially lessen competition. Such an agreement may be legal, however, if the seller proves

13. It is assumed that the trial court may have refrained from giving a stronger instruction as to the effect of the defendants' insistence upon the execution of a service contract as a condition to the purchase of Jerrold equipment because of certain language used by the court in United States v. Jerrold Electronics Corp., (D. C. E. D. Pa.) 187 F. Supp. 545 (1960) (affirmed Per Curiam 365 U. S. 567). In that case the United States sought to enjoin Jerrold from acts in violation of §§ 1 and 2 of the Sherman Act. The court found that Jerrold and Jerrold-Northwest did attempt to create a monopoly in the market for community television antenna equipment in the states of Washington, Idaho and Western Montana, and enjoined those defendants from refusing to sell any item of Jerrold equipment because of a requirement that the purchaser subscribe to Jerrold's services. In the earlier case, however, the trial court expressed the view that Jerrold's tie-in arrangement was, when first initiated, reasonable. No effort is made in this case to assert that the judgment in that action brought by the United States was prima facie evidence against the defendants here.

that there was a bona fide and reasonable business necessity for selling his product only with another product or service." The court also charged the jury as follows: "If you find that the defendants were justified in their policy of the sale of systems only with a service contract, it did not constitute an unlawful combination or conspiracy for them to make that policy effective by obtaining the cooperation of their employees and others who were handling their equipment."

The record here is replete with evidence to warrant the jury in finding that the defendants wholly failed to prove a bona fide or reasonable business necessity for the tie-in arrangement or that the same as practiced here was reasonable. There was evidence to warrant the jury in finding that Jerrold was unable to furnish the engineering services called for in its service contract. Thus, on November 4, 1953, Merritt wrote to Jerrold, referring to the service contract and the form thereof submitted by Jerrold, and complained that "you promised a lot of things which you have not delivered—or to sell the contract forced us to promise a lot of things which we could not deliver because you never made them available—except on a conversational basis. We refer specifically to those services outlined in Paragraph F of your new agreement." He complained that what was promised in the contract should be made "available in concrete form rather than on a conversational basis." Apparently Hamlin and Merritt themselves felt at the time that the tie-in of the service agreement was unreasonable. Hamlin, testifying, stated that he had objected to Shapp about requiring the service agreement: "A. Well, it was my feeling and that of Mr. Merritt that we should not enter into a sales program trying to enforce the maintenance and service agreement. We felt that it was unworkable in this area and we objected to it. We were finally persuaded by Mr. Shapp to go ahead with it, but it's a matter of record in all of the correspondence that took place at that time that both Merritt and I were against it

in so far as the intercompany dealings were concerned. Externally I think anyone will tell you that we sold it vigorously. Q. What were the reasons as to why you opposed the policy of the Jerrold service contracts? A. The first was sales resistance. The second was the feeling that it was unenforceable. And the third was that it would be difficult to administer and properly service with the personnel we had on hand."

It was the theory of the defendants that the requirement of a service contract was primarily to make sure that after the installation of the antenna system it would continue to function properly; that if something went wrong after the installation this would hurt the good name of Jerrold, and to make sure that this result would not occur, Jerrold felt that a service contract was essential. There was, however, evidence to indicate that such was not necessarily the primary purpose of the contract. Hamlin testified that in conversation with Shapp he had learned that one purpose of the sale contract was to control sales and also to give Jerrold an additional and continuing share in the proceeds of the system. According to Hamlin he had learned that Shapp felt that if the system was a success Jerrold should get a continuing revenue from its operation. This would be accomplished because under the service contract payments for the service would be continued during the period of the system's operation, and thus Jerrold would share in the "after profits that their engineering had made possible;" and also "to permit them to participate in the after profits of the system," a method of getting an additional financial return.

Under all these circumstances the jury under the instructions stated above, to which no objection was taken, could well find that there was a total failure to establish the reasonableness or other justification for the tie-in arrangement. In consequence the fact that the tie-in was insisted upon would constitute further proof of an illegal combination in restraint of trade.

In attacking the judgment below, appellants undertake to examine separately each of the acts done by the defendants and to argue that each such act, so viewed can be defended as entirely legal conduct. Thus it is argued that the mere fact that Jerrold was successful in producing a useable antenna system which operated successfully and commanded approval from purchasers was no evidence of a violation of the antitrust laws. Then it is said that if Jerrold or Shapp chose to organize enterprises for the development of community antenna systems in various communities that also would be no evidence of antitrust violations. Then it is contended that even if the service contract arrangement was designed to provide additional compensation to Jerrold on the sale of its systems, that would be no wrong for one who has something to sell has the right to fix a price at any sum he chooses. Again it is argued that if the Whitney-Shapp group chose to enter Wenatchee or any other city for the purpose of going into competition with a rival community television enterprise, such proposed competition was in no sense evidence of any antitrust violation.

The difficulty with this approach is that it fails to take into consideration what really happened here, which is that a powerful group of business concerns and their subsidiaries set up a scheme by which they excluded potential competitor concerns like Wescoast from access to a supply of vital materials. "[I]t is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." Continental Co. v. Union Carbide, 370 U. S. 690, 707. The Shapp-Jerrold Whitney-Hamlin-Merritt group had sufficient command over these essential components to be able to impede and exclude new entrants into the market. We have here the sort of thing which Mr. Neale describes under the heading of " 'Bottleneck' agreements which deny scarce facilities to competitors." [14] Here Wescoast was excluded

14. Neale, The Antitrust Laws of the United States of America, 1960, pp. 68-72, and see also the discussion of "Collective exclusive-dealing agreements" pp. 66-68.

from any practical access to the necessary facilities in a manner comparable to that which was described in Associated Press v. U. S., 326 U. S. 1. Cf. Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, and Montague & Co. v. Lawry, 193 U. S. 38.

We think that the proof of a combination or conspiracy in restraint of trade was ample here. There was also evidence of an attempt to monopolize the market on the part of the defendants. A relevant market here would be made up of those cities in the Northwest which we have previously mentioned. Originally Video Associates, operated by Hamlin and Merritt, were the distributors of Jerrold equipment in that area, but during the period here involved Jerrold-Northwest, Inc., defendant here, was organized as previously indicated, giving Shapp, the dominant owner in Jerrold, a share in the profits of the distribution of Jerrold equipment in this area. Then to round out the Jerrold-Shapp complete control of the anticipated antenna systems the Whitney-Shapp arrangement was made. A fair inference from these facts must be that these parties were thus undertaking to see to it that they controlled the community television systems in these areas all the way from the manufacture of the components through the distribution thereof and down even to the construction and operation of individual systems within the cities named. This monopoly power was, as we have seen, utilized to see to it that Wescoast could not successfully enter this market or maintain any competition with the monopolizers.

This brings us to the question of whether, as claimed by the appellant, there was insufficient proof that the plaintiffs suffered damage as a proximate consequence of the acts of the defendants. We have previously indicated some of the consequences which befell Wescoast when it found itself unable to acquire Jerrold equipment. We have noted that Wescoast had limited financial resources and that when it entered Wenatchee and began the construction of its antenna system it was counting on financing the construction in part from the charges which it made to individual

users of the system when connecting cables to their homes. When the competition from the Whitney-Shapp system held out the threat of a rate war through the latter's giving connections to customers without charge, Wescoast despaired of relying on this anticipated income for its necessary financing. In consequence of the situation in which Wescoast had been placed through the circumstances which we have previously described, Wescoast agreed to sell. The testimony indicates that they had no way out. As Wallace testified: "I felt better that we lose a battle than lose the whole war." [15]

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15. Wallace testified as follows: "Q. Why was the decision reached by Mr. Rogan Jones and wife and Mr. Wallace to sell the system to the Wenatchee Television Cable Corporation? A. They refused our offer of $25,000 to pick up and take their equipment and salvage and leave. This was all we felt we could offer. It was more than we had, and we had asked five or six of our long-time business suppliers, specifically, Graybar, P. U. D., General Telephone, Mid-State Radio, Wells and Case Hardware, to give us a line of credit up to $10,000, nothing in writing. It was given but we had used up, in almost every case, our agreement, gentlemen's agreement, that we wouldn't draw over that on them and our bank balance was zero-zero. More important, the over-all was that the president, Rogan Jones, the principal stockholder, was building broadcast television for Bellingham and he too assured me that he was in the same spot I was; that he needed money to keep the television operation there. We were holding KVOS' note at KPQ, Wenatchee, for more than $50,000, which had been pledged, and which he could not borrow more with that note outstanding.

As a second consideration, I myself had put in my insurance. I had borrowed against my insurance, against my home, all that I could borrow against my few stocks that I owned. I had every financial asset I had pledged for borrowing to keep operating. The financial statement will show that our income from the sale of connections was adequate, possibly, to keep going, but if our source of capital return was cut off in a rate war of giving connections away, I was all done, and would go down the drain, not I personally, but the company, more important. I fought right down to the last minute, but, more important, the final decision was that you must be loyal and my business associate had a venture on which we could make it. There was no competition in the television broadcasting business in Bellingham. I had encouraged him to go into the business there, and I felt better that we lose a battle than lose the whole war. I agreed to sell."

We think that the evidence here would justify the jury in believing that in consequence of the acts and conduct of the defendants Wescoast had been driven to its knees and finding no other way out had agreed to sell for an agreed price of $50,000, reserving the right to salvage some of its equipment. The salvage produced $18,739.91. The evidence showed Wescoast's net investment in its system to have been $189,984.45. There was evidence to show the fair market value of its properties to be in excess of that sum; but subtracting the amounts received from the amount last mentioned would indicate out-of-pocket loss of $121,254.54, considerably in excess of the jury's award. We are unable to perceive any reason for a contention that there was lack of proof of damage or of the amount thereof.

For the reasons which we have here detailed, we find no basis for appellant's contention that the court should have directed a verdict in its favor.

Appellants further list certain conduct of the trial court which it is asserted constituted error and grounds for reversal and an order for new trial. We have examined all of these contentions and find them without merit.

The first such contention made is that the court erred in reading a statement to the jury at the outset of the trial advising the jury as to the nature of the case which was about to be tried and of the issues which it was anticipated would be present. It is argued that this was a flagrant violation of the provisions of Rule 57 Rules of Civil Procedure which provides that the jury shall be instructed after the arguments to the jury had been completed. At the conclusion of the evidence, the court, as the rule requires, informed counsel on their proposed requests for instructions which had been made by counsel, and after argument to the jury had been concluded the court then instructed the jury fully as to the issues involved and with respect to the matters to be determined by them. We are unable to perceive in what manner the court's earlier outline of the case at the beginning of the trial could have been prejudicial to the defendants, and appellants have not furnished

any satisfactory explanation as to why they think they were prejudiced by this procedure.

One of the persons called on the jury was an agent for the F. B. I. who in the past had investigated violations of antitrust laws. On examination by the court this juror expressed the view that this circumstance would not in any way prejudice him in this case and he thought he could be fair to both sides. The juror was challenged for cause by the defendants, whereupon the court indicated that he did not think the juror was disqualified by what he had said, and stated to defendant's counsel: "I will give you the opportunity of making further inquiry if you think you can establish it." Counsel did not make further inquiry. Under the circumstances we are of the opinion that the court's action in declining to excuse this juror disclosed no error.

It is argued that certain evidence as to value was inadmissible. We find no merit in this contention. Again it was contended that the court improperly admitted certain exhibits, to one of which we have previously alluded, making certain threats against television competitors at Livingston and Bozeman, Montana. It is argued that these should not have been admitted because they occurred more than a year after the dates when defendants were dealing with Wescoast. Actually they occurred about a month after Wescoast sold to the Whitney-Shapp corporation. The evidence was admissible for the reason stated in Girardi v. Gates Rubber Company Sales Division, Inc., 325 F. 2d 196, 203.

It is argued that the court should not have charged the jury with respect to monopoly. What we have previously said as to proof of monopoly sufficiently answers this contention.

As to the further argument that the court's instructions on conspiracy in restraint of trade were unduly repetitive, we think the contention wholly without merit. Furthermore, the record fails to show that in objecting or taking exception to the instruction referred to, counsel com-

plied with the requirement of Rule 51 F. R. C. P. which requires counsel to state "distinctly the matter to which he objects and the grounds of his objection."

Complaint is made that the court should have given a requested instruction telling the jury that they should determine whether there had been "any significant effect upon the movement of goods in interstate commerce." This instruction was properly rejected both because, as earlier in this opinion it is indicated, the interstate character of the commerce here involved had been stipulated and because the evidence conclusively showed that the amount of interstate commerce here was substantial.

In making its case the plaintiff introduced voluminous correspondence and other documents exchanged by or written by the defendants or some of the persons collaborating with them. Some portions of this correspondence contained statements contrary to the allegations of the plaintiff's complaint and of contentions made by it in pretrial order. It is contended that because this evidence was offered by the plaintiff these various contradictory statements are binding upon the plaintiff. We know of no such rule. To the extent that documents originally designed to serve the defendants and their purposes also contain statements which support the claims of the plaintiff, the plaintiff may rely thereon without having to accept as verity all that appears in such documents.

In like manner some of the witnesses for the plaintiff on occasion appeared to contradict themselves. All of these matters and the significance to be attached thereto present issues properly to be determined by the jury who are the sole judges of the weight and credibility thereof.

Since we find no error in this record, the judgment is affirmed.

APPENDIX B.

AMENDMENT VII OF THE CONSTITUTION OF THE UNITED STATES:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

* * *

SECTIONS 1 AND 2 OF THE SHERMAN ACT, 15 U. S. C., §§ 1, 2:

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition

under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.